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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN VILLEGAS, Defendant and Appellant.	B203971 (Los Angeles County Super. Ct. No. NA073017)

APPEAL from a judgment of the Superior Court of Los Angeles County. John David Lord, Judge. Affirmed.

Cindy Brines, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

Jonathan Villegas appeals from a judgment entered following a jury trial in which he was convicted of second degree robbery. (Pen. Code, § 211.) Villegas contends that because the evidence supported a finding that he did not take the property by means of force or fear the trial court committed reversible error by failing to instruct the jury sua sponte on the lesser included offense of theft. We agree the evidence warranted an instruction on theft but find the error harmless. Accordingly, we affirm.

BACKGROUND

Prosecution Evidence

On January 11, 2007 as Xian Jin was walking home from school taking his usual route down an alley paralleling Lomita Boulevard in Harbor City he saw Villegas in front of him. When Villegas was at least 38 feet ahead of him Villegas entered an apartment building and Jin lost sight of him.

As Jin neared the apartment entrance Villegas came out, walked up to Jin, and asked him for the time. Looking at his cell phone he told Villegas the time. Villegas snatched the cell phone from Jin's hand and ran away.

Jin gave chase, caught up to Villegas, and grabbed him by the sweatshirt. Villegas told Jin to let him go, and when Jin did not, Villegas punched and kicked Jin, ripping his ear and bruising his chest and stomach. Jin fought back and punched Villegas several times. Villegas slipped out of his sweatshirt and ran away with the cell phone. Jin again gave chase and, catching up with Villegas, Jin grabbed Villegas by his T-shirt and held on. Villegas threw Jin's cell phone to the ground, Jin released his grip, and Villegas ran off.

Jin retrieved his cell phone and walked back down the alley to the location where he had left his jacket and backpack. Discovering that his property was missing, he used his cell phone to call 911.

An officer arrived to assist Jin and they found most of Jin's school books scattered about on another street. Within an hour of the incident, police detained three potential suspects matching Jin's description of his assailant. In a field show-up Jin identified

Villegas as the person who had assaulted him and taken his cell phone. When detained Villegas was holding his black sweatshirt and was wearing a wrinkled, disheveled T-shirt. According to the arresting officer Villegas was sweaty and his heart was racing.

At the police station, Villegas provided a written statement describing the incident: "I was walking up Western from my friend Michael's house, in Lomita," and "I went to McDonalds to get a Coke. I was walking down the alley and asked someone for the time. He thought I was going to steal his phone or something, and he hit me hard, so I hit him back, and then I ran. I didn't want to get in trouble for fighting. But I didn't hurt him, because he was too small for me. But I didn't steal anything. I took off and then the officers took me in for nothing. I didn't steal anything."

The investigating officer who interviewed Villegas the next day testified Villegas said that he was walking down the alley, saw Jin, and asked him for the time. Jin stopped, pulled out his cell phone, and looked at its time display. When Villegas said that he liked Jin's cell phone and touched it, Jin got nervous, apparently afraid he was about to be robbed. They got into a fight and Villegas ran off.

Defense Evidence

Testifying on his own behalf, Villegas said that at the time of the incident he resided in Bakersfield but was in Lomita visiting friends. His friends had gone to work, he had nothing to do, and decided to walk to the park. While walking to the park he saw Jin and asked him for the time. Jin did not respond verbally but took out his cell phone and showed Villegas its time display. Villegas got closer to better see the time display and touched the phone. The moment Villegas touched the phone Jin "got physical." He started punching Villegas in his face and cheeks and during the struggle kicked him as well. Jin grabbed Villegas's wrist, pulled Villegas's sweatshirt over his head, and kicked Villegas in the groin. Villegas was in such pain he lurched forward. He managed to wriggle out of his sweatshirt and then pulled Jin's sweater over Jin's head. When he did so, the cell phone fell from Jin's hand to the ground. It was the first time the cell phone was out of Jin's hands. Villegas was so angry about being kicked in the groin that he

picked up the cell phone from the ground, threw it in the street, and ran away. Villegas walked to a friend's house but no one was home. He started walking back and was arrested.

On cross-examination, Villegas denied grabbing the cell phone from Jin's hand. He testified that the only time he held the cell phone was when he picked it up and threw it after it fell to the ground. Villegas agreed that at the time of the incident he weighed 230 pounds.

Villegas's mother testified that Villegas was passive and had never been involved in fights. She testified that he had a job, got along well with everyone, and had not been a problem in his youth. Villegas's stepsister testified that she had never noticed him to be combative or physical with others. She thought he was a generous and giving person.

Rebuttal Evidence

The investigating officer testified that during his interview the day after the incident Villegas said nothing either about Jin kicking him in the groin or about throwing the phone because he was angry with Jin for kicking him in the groin. According to the officer, Villegas only admitted "touching" the phone when looking at its time display.

Procedural Background

An information charged Villegas with second degree robbery. (Pen. Code, § 211.) The jury convicted him as charged. The court sentenced Villegas to the midterm of three years in state prison and imposed related fines and assessments. The court later granted Villegas's motion to reconsider and modify his sentence and on reconsideration sentenced him to three years' formal probation instead.

Villegas appeals from the judgment.

DISCUSSION

Villegas contends the evidence raised a question of whether he took the cell phone without force or fear and thus the court erred in failing to instruct sua sponte on theft as a lesser included offense of robbery. His claim has merit.

Elements of Robbery

Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, § 211.) Theft occurs when a person "feloniously steal[s], take[s], [or] carr[ies] . . . away the personal property of another[.]" (Pen. Code, § 484, subd. (a).) To "feloniously take" property means the specific intent to deprive another of the property permanently, or temporarily for an unreasonable time so as to deprive the person of a major portion of its value and enjoyment. (*People v. Avery* (2002) 27 Cal.4th 49, 58; see also, CALJIC No. 14.03.)[1] The "taking" element of robbery "itself has two necessary elements, gaining possession of the victim's property and asporting or carrying away the loot [Citation.]." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165.) For this reason, theft "becomes robbery if the perpetrator, having gained possession of the property without use of force or fear, resorts to force or fear while carrying away the loot. [Citations.]" (*Id*. at p. 1165, fn. 8.) Conversely, because robbery has the additional element of a taking by force or fear theft is a lesser and necessarily included offense of robbery. (*People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351.)

Trial Court's Sua Sponte Duty to Instruct

"It is well settled that the trial court is obligated to instruct on necessarily included offenses—even without a request—when the evidence raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense. [Citations.]

"The necessity for instructions on lesser included offenses is based in the defendant's constitutional right to have the jury determine every material issue presented by the evidence. [Citations.] As the United States Supreme Court explained in *Keeble v. United States* (1973) 412 U.S. 205, 212: '[I]t is no answer to petitioner's demand for a

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1 CALJIC No. 14.03 provides: "The specific intent [required] [which is an element of the crime of [theft] [and robbery] is satisfied by either an intent to deprive an owner permanently of his or her property, or to deprive an owner temporarily, but for an unreasonable time, so as to deprive him or her of a major portion of its value or enjoyment."

jury instruction on a lesser included offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.' [Citation.]" (*People v. Ramkeesoon, supra*, 39 Cal.3d at p. 351 [evidence warranted an instruction on theft as a lesser included offense of robbery where the defendant testified he did not form the intent to steal until after the victim had been fatally wounded].)

Application to the Present Case

Villegas notes that Jin's version of the crime was divided into two parts, the first part when he took the cell phone from Jin's hand and ran away with it—the theft—and the second part where Jin chased after him and an altercation ensued as Jin attempted to retake his phone—the robbery. Based on Jin's testimony that Villegas snatched the cell phone from Jin's hand and ran away with it, Villegas contends the jury could have found that a theft, but not a robbery, had occurred because at this point there was no evidence he used fear or force beyond the minimum necessary for the physical taking.

We agree the record contains no evidence Villegas employed either force or fear when snatching Jin's cell phone. (See, e.g., *People v. Morales* (1975) 49 Cal.App.3d 134, 139 [the amount of force required to elevate a taking from the person to a robbery has not been precisely defined but more is required than "just that quantum of force which is necessary to accomplish the mere seizing of the property"].)[2] Villegas, however, provides no principled reason to parse out the evidence of his physical

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2 The People apparently concede there was no evidence the initial taking involved either force or fear.

possession of the property from the evidence of his forcible asportation in order to argue that the crime amounted to no more than theft. Indeed, on this record, there is no reason to conclude that any rational juror would believe one aspect of Jin's testimony—that Villegas snatched the cell phone from his hand—and disbelieve the other part of Jin's testimony—that Jin ran after Villegas, grabbed his sweatshirt, and attempted to retake his phone and Villegas punched and kicked him in response, elevating the crime to robbery.

Jin testified that once Villegas gained possession of the cell phone and tried to run away with it Villegas forcibly resisted Jin's attempts to retake control of his cell phone. Because robbery is a continuing crime, in Jin's version of the events the "snatch" became a robbery because "the perpetrator, having gained possession of the property without use of force or fear, resort[ed] to force or fear while carrying away the loot." (*People v. Cooper, supra*, 53 Cal.3d at p. 1165, fn. 8; see also, *People v. Estes* (1983) 147 Cal.App.3d 23, 27 [defendant was properly convicted of robbery where he forcibly resisted the security guard's efforts to retake the store's property]; *Miller v. Superior Court* (2004) 115 Cal.App.4th 216, 219-220, 223 [defendant was properly charged with robbery on evidence that he surreptitiously took the victim's wallet and when the victim realized his wallet was missing he struggled with the defendant until he released the wallet].) We thus disagree that Jin's testimony supported an instruction on the lesser included offense of theft.

Villegas asserts that his version of the events would also have supported an instruction on theft. We agree. At trial, Villegas testified that Jin had continuous possession of his cell phone until Villegas pulled Jin's sweater over his head and the phone fell from Jin's hand to the ground. Villegas testified that he picked the cell phone up from the ground and threw it. A reasonable inference from this evidence is that Villegas's purpose in picking the cell phone up from the ground and throwing it in the street was that he intended to damage or destroy the phone in order to deprive Jin of its use. A reasonable juror could conclude from this evidence that this temporary possession and attempted destruction of the phone was a "taking" for purposes of a lesser included theft instruction. (*People v. Avery, supra*, 27 Cal.4th at p. 58; CALJIC No. 14.03; *People*

v. Breverman (1998) 19 Cal.4th 142, 177 [in deciding whether evidence is sufficiently substantial to warrant an instruction, "a court determines only its bare legal sufficiency, not its weight"].)

Although the evidence warranted an instruction on the lesser included offense of theft we conclude that failure to give the instruction was harmless. "[I]n a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under *Watson* [*People v. Watson* (1956) 46 Cal.2d 818, 836]. A conviction of the charged offense may be reversed in consequence of this form of error only if, 'after an examination of the entire cause, including the evidence' (Cal. Const., art. VI, § 13), it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred (*Watson, supra*, 46 Cal.2d 818, 836)." (*People v. Breverman, supra,* 19 Cal.4th at p. 178, fn. omitted.)

When Villegas admitted that an altercation occurred at all, he claimed that Jin was the first aggressor and that he only responded in self defense. The jury likely found his testimony improbable where the evidence showed that Jin was a "small" junior in high school and Villegas was a 230 pound 20 year old. Villegas also testified that he only threw Jin's phone because he was angry after Jin kicked him in the groin. The jury could reasonably have questioned his description of the incident because in neither of his pretrial statements did he mention the allegedly precipitating event of being kicked in the groin.

In addition, Villegas's version of the events was contrary to the physical evidence. He denied snatching Jin's phone and, for this reason, denied that Jin had chased after him in attempting to retake his cell phone. However, the evidence showed that the location where the altercation ultimately concluded, and where Villegas threw the phone, was a considerable distance away from the location in the alley where Jin had dropped his jacket and book bag as he chased after Villegas to retrieve his phone. This fact corroborated Jin's testimony that a robbery occurred because it confirmed that he chased after Villegas and fought with him after Villegas snatched his phone.

The police officers' testimony also corroborated Jin's testimony that a robbery occurred. The first officer on the scene testified that he noticed that Jin's ear was injured, corroborating Jin's testimony that Villegas had punched him while resisting his efforts to recover his phone. The arresting officer testified that when detained Villegas was sweaty, holding his black sweatshirt, and wearing a wrinkled, disheveled T-shirt. This testimony corroborated Jin's testimony that the second time Villegas ran away with his phone, Jin grabbed onto his T-shirt and struggled with Villegas over control of his cell phone.

In short, because Villegas's defense evidence was comparatively weak and because Jin's testimony that a robbery occurred was supported by independent evidence it is not reasonably probable that a reasonable juror would have been persuaded by Villegas's testimony that only a theft occurred. For these reasons, and in light of the entire record, including the evidence, it is not reasonably probable Villegas would have achieved a more favorable outcome had the jury been instructed on the lesser included offense of theft. (*People v. Watson*, *supra*, 46 Cal.2d 818, 836.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

TUCKER, J.*

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* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.